

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

77-2032

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
JOSEPH COLLINS, :
Petitioner-Appellant:
- against - :
WALTER FOGG, Acting Superintendent, :
Green Haven Correctional Facility, :
Respondent-Appellee :
-----x

B
Q/S

DOCKET NO.: 77-2032

On Appeal from the United States District Court
for the Eastern District of New York

APPENDIX FOR PETITIONER-APPELLANT

JAMES J. McDONOUGH
Attorney in Charge
Legal Aid Society
Nassau County
Criminal Division
400 County Seat Drive
Mineola, NY 11501



PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

	<u>PAGE NO.</u>
Findings of fact and conclusions of law of the County Court of Nassau County made on March 11, 1974	A-1
Memorandum opinion of the New York State Appellate Division, Second Department, decided on June 2, 1975	A-23
Memorandum opinion of the New York State Court of Appeals, decided on March 25, 1976	A-24
Memorandum and order of the United States District Court for the Eastern District, dated January 18, 1977	A-26

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

THE COURT: Testimony was taken at a hearing on defendant's application to suppress certain statements and confessions, physical evidence seized at the time of the defendant's apprehension and to suppress an identification made at a showup.

On October 20th, 1973, Patrolman Charles Parker of the Freeport Police Department, operating a police patrol vehicle, and Sergeant Vincent Toner, who was operating another such vehicle, at about 5:42 a.m., were notified by police radio that there was an assault in progress at 161 North Main Street, Freeport. They came to the scene, a laundromat. There was a vacant lot to the rear and to the side of the laundromat.

Two men were standing on the street, pointing to the rear lot. They informed the police that there was a man there beating up a woman. In the vacant lot they found

Miss Eugenia Kusky, who testified that, accompanied by her four-year old daughter, she had been using the facilities of the laundromat, when she observed an individual whom she identified as the defendant, first looking at her through the glass front of the store.

He came in. She further testified he placed his arm around her, at which time she looked squarely at him in the well-lit store. She pulled away, went to the washing machine, followed by him, where again she saw him face to face. He pushed her to the back of the store and then to the floor, and then stamped -- the words she used was "stomped" -- on her face and head. He was wearing the shoes or three-quarter boots here marked People's Exhibit 1 in evidence. These are heavy shoes with platform soles and high heels. The heels are about three inches in height, several inches in width.

Her head, nose and eyes were injured and bleeding. She was dragged out of the laundromat to the lot behind the store. The defendant did not remove his trousers or underclothing, but opened his fly and exposed his penis. Her pants and underclothes were forcibly removed.

The intruder's hand was over her throat. During this time, his face was close to hers and of

her. He spoke. He asked her, "Do you want me to do this to your child?" There was other conversation.

He inserted his penis into her vagina, coitus followed, with ejaculation into the vagina. The sex act had hardly been completed, when Patrolman Parker and Toner arrived almost simultaneously. The intruder made a hurried adjustment of his clothes and ran to the street.

At that point, he was not seen by the police officers. The officers observed Miss Kusky, her clothing disarrayed, her slacks down to her knees, bleeding from her head and face, with blood on her clothes. The victim described to them what had happened, stating that she had been assaulted and raped.

She gave a description of the intruder as being 20-years old, black, five-foot-six inches in height, wearing white or light colored shoes, brown slacks and a white or light colored jacket.

Patrolman Parker left to search for the person accused of the rape. After Patrolman Toner broadcast a description of the assailant, he and Miss Kusky cruised the area in his car, searching for the suspect.

As Patrolman Parker backed his vehicle into North Main Street, he observed a black male, carrying something and running north on East Main Street, from the west

to the east side of East Main Street, near Milton Street, approximately one-and-a-half blocks to the north of the laundromat.

The officer proceeded to Milton, turned east one block to Jay, and then south one block to Dean and then back to Milton and Jay, where he saw the defendant running in an easterly direction, on the north side of Milton, between North Main Street and Jay, carrying the white, heavy, platform shoes, People's Exhibit 1.

He was apprehended by Patrolman Parker, handcuffed with his hands behind his back and placed in the rear seat of Patrolman Parker's vehicle. His shoes were placed in the car. Patrolman Parker seated himself behind the wheel.

Then, at about 5:50 A.M., he radioed that he had a suspect in custody at Milton and Jay. Patrolman Toner, with Miss Kusky seated beside him, came to the scene, and at a slow rate of speed, about one to two miles per hour, passed Patrolman Parker's vehicle, which was lighted from within and from without. His car was facing in an easterly direction. Patrolman Toner's car was proceeding in a westerly direction, so that the defendant and Miss Kusky were facing each other. This confrontation took place not more than three minutes after the

sex act had been completed.

As they passed each other, Miss Kusky said, "That's the man that just beat me up," and then at the hearing she pointed to the defendant as the rapist.

Patrolman Toner then directed Patrolman Parker to bring the defendant to the Freeport police station. In the meantime, Patrolman Parker had instructed the defendant as to his constitutional rights, Miranda warnings, and asked about the rape. The defendant responded by saying that he did not know what the police officer was talking about.

At about 5:55 A.M. the defendant was brought to the Freeport police station and a Nassau County detective, First Squad, was notified. A detective from that squad arrived at about 6:20 A.M. At about 7 A.M., at the Freeport police station, the defendant's jacket, trousers, T-shirt and undershorts were removed. Those are People's Exhibits 2, 7 & 8 on this hearing. The defendant was supplied with other clothing.

The defendant was supplied with other clothing.

At approximately 7:25 A.M., the defendant was taken to the Baldwin precinct. Between 8:45 and 9 A.M., Detectives Morrissey, Furno, Hazyck and Detective-Sergeant Lloyd arrived for that day's shift. No inculpatory

statements were made by the defendant at that point.

In the period prior to 10 A.M. he was, on a number of occasions, again advised as to his Miranda rights, and several detectives spoke to him. His answers were not inculpatory.

At about 9:30 A.M., Detective Morrissey, after again advising the defendant of his constitutional rights, spoke to the defendant about the defendant's drinking, his sister and his belief in God. The defendant then said "I'm ashamed, I'm ashamed," and asked to speak to Detective Morrissey alone. People's Exhibit 9, a detailed confession, followed. The defendant read the statement aloud and then signed it. It was witnessed by Detective Morrissey and Patrolman Parker.

In this confession, in addition to admitting the rape, the defendant stated that shortly after 4 A.M., after leaving the Tropicana Bar, he went to the house of his girl friend, who let him in. He stated that they sat in the living room, played cards and then went upstairs to her bedroom and had sexual intercourse.

He stated further that he left her house about 5 A.M. walked around Freeport for a little while and reached the

5:30 A.M. The named girl friend was

brought to the police station. Her statement denied that the defendant had visited her that morning and that he had had intercourse with her then.

Between 11:30 A.M. and noon, the defendant was confronted with these facts and again given Miranda warnings and asked whether he wished to change his statement. The defendant said that he did. There resulted People's Exhibit 10, another confession, which parallel People's Exhibit 9, except for People's Exhibit 9's reference to the events relating to the girl friend.

People's Exhibit 10 was read aloud by the defendant. It was signed and witnessed by him. That is, it was signed by him and witnessed, between noon and 12:30 P.M.

The defendant remained at the First Squad until 2:44 P.M. He was then taken to police headquarters in Lincoln, where he was photographed and fingerprinted. At the main desk he was asked whether he had any injuries (see People's Exhibit 22). He answered that he did, that his back and hip were injured, that he had been kicked and beaten by the police and that he wanted a doctor.

He was thereupon taken to the Nassau County Medical Center, about 4 P.M., where he was examined and admitted. Dr. Firoozi, after a physical examination, found a small

hematoma and an abrasion over the defendant's left eye and noted that the defendant complained of CVA tenderness, bilateral. He ordered a urinalysis and other tests, all of which were negative, except for the urinalysis, which showed the presence of red blood cells, "THTC," which the doctor said stood for "too numerous to count."

Dr. Firoozi stated that a competent producing cause for the presence of red blood cells in the urine is "infection, tumor or trauma."

With the history given by the patient, a final diagnosis was made of "left renal contusion." According to Dr. Firoozi, the defendant gave a history of a recent hernia or varicocele repair. The doctor testified further that except for the superficial hematoma and an abrasion over the left eyebrow, he observed no observable signs of trauma.

He stated further that if the presence of the red blood cells were traumatic in origin, the trauma would have had to have been recent, although he could not state how recent, and that if there had been trauma, that external signs would not necessarily be apparent.

He stated further that, after considering a recital of the defendant's testimony given in the form of a hypothetical, as to the beatings stated to have been

administered to him by the police, that he would expect such trauma to have injured the defendant's bladder, kidney and ureter.

A review of the testimony given by the defendant of alleged police brutality is in order. The defendant testified that when apprehended, he was threatened by Patrolman Parker who, among other things, said, "I ought to blow your lousy brains out." When placed on the back seat of the police car, he was handcuffed with his hands in front of him. Patrolman Parker was seated alone with him in the car, in the driver's seat.

Since this would have put the officer in danger, the defendant's statement is incredible.

He further testified that as Patrolman Parker was sitting there in that position, using a small blackjack, he beat him over the top and the back of the head. He demonstrated this in the courtroom. It was difficult to see how, in the position he demonstrated, this could have happened. He then stated that Patrolman Toner entered the car and began to beat him over the shoulders and back, using a night stick.

It should be noted that Patrolman Toner at this point was in his own patrol car with the victim. He had not stopped at the scene. He had proceeded past Patrolman

Parker's car and had gone on to the Freeport police station with the victim.

The defendant then testified that as a result of these beatings, his nose was "busted" and bleeding, that he received a cut over the right temple and his right eye was injured. It should be noted there is no evidence to support these statements. The evidence is to the contrary.

He testified further that on his way to the police station, he was again beaten over the shoulders and back. He insisted that he had never been taken to the Freeport police station. This is incredible. The evidence by the other witnesses as to the events at the Freeport police station are detailed and unquestionably occurred. For example, this is where the defendant's clothing was removed and other clothing substituted.

He testified that at the Baldwin police station he was handcuffed. Patrolman Toner, he stated, beat him over the shoulders, using his fists, kicked him and used, in addition, a small blackjack or night stick. Parker, Toner, Hazyck and a "tall, blond individual in civilian clothes," then beat him up, threatened to throw him out of the window and shoot him on the way down. The blond man gave him a chop across the back of the neck.

He went to the bathroom to call after his girl out of the bathroom window. When he yelled to her, he was again beaten by Patrolman Parker, taken back to the squad room, where more blows were administered by Patrolman Parker, Patrolman Toner, the blond detective and Hazyck. He was hit on the back and sides, on his head. He was kicked. A blackjack was used. Detective Hazyck kicked him first in his midsection and groin, while the defendant was seated in a chair, so that the chair and the defendant fell over backwards, and the chair was broken.

While on the floor, Hazyck kicked him in the groin, where the defendant had been recently operated on.

Shortly thereafter, Parker, Toner and Hazyck and the tall blond punched him in the ribs, midsection, back and head. They kicked him. He was threatened again.

While the defendant was being transported to Mineola, Parker and Toner attacked and beat him in the police car. He testified that he was barely able to walk when photographed. He stated that he was beaten on the way to the hospital, that while in the hospital, every time the doctor left the room, Toner and Parker beat him some more.

At one point, while in the detention cell, he was

threatened with having his penis "burst." That is the word he used.

When taken to the third floor of the hospital, Parker and Toner got in a few punches to his sides.

The police brutality testified to by the defendant, if believed, would unquestionably have made the survival of the defendant a modern-day miracle. His testimony was directly contradicted by each of the police officers, who specifically denied that the defendant had been threatened or struck or that any duress had been used.

There was further testimony that no "tall, blond detective," was employed in the First Squad. The defendant then testified that the tall, blond was Detective-Sergeant Lloyd, who has dark brown hair, which appeared black to the Court. He could only be called a brunette, although he has some gray in his hair.

The police officers' testimony the defendant was not beaten and showed no signs of injury, and the story of police brutality being without foundation, is borne out by People's Exhibit 17 and People's Exhibit 33, the mug shots, which were taken at 5:20 P.M. on October, 1973. The face and shoulder portions of these exhibits were enlarged many times. With respect to People's Exhibits 29, 30 and 34, this Court, upon close examination

of these photographs, even when aided by an enlarging glass, reveals no observable injuries, except perhaps for a small mark in the left corner of the left cornea.

They also show, beyond cavill, an alert wide-awake, obviously oriented defendant, showing no signs of pain or any observable signs of police brutality. It is questionable that any individual, even if he had survived the brutality he described, would have demonstrated in the photographs the radiant, good health shown.

The Court finds that the testimony given by the police is truthful and rejects that given by the defendant. In this connection, the Court strikes all the testimony, and has not considered such testimony as was given on cross examination, which involved the use of People's Exhibit 23. I have reached my conclusions, based solely on the testimony and as much of the testimony as was given by the defendant that did not involve the use of People's Exhibit 23.

There remains, however, the troublesome question relating to the findings at the hospital that the defendant had a small abrasion and hematoma over the left eye and that the defendant had red blood cells in his urine. There is a duty imposed upon the People to explain and account for the injuries described at

the hospital, if it appears that the defendant sustained his physical injuries while in custody. People against Valletutti makes this qualification clear. It is true that at Page 230, the Court quotes from People against Barbato, 254 New York, 170 where, at Page 176, the Court of Appeals said, "The District Attorney, on the evidence, was called on to account for the defendant's condition," and then goes on to state, "a similar duty was on the People in this case and no sufficient accounting is in the present record." Above it, however, there appears this language: "However, it plainly appears that the defendant did somehow sustain substantial physical injuries while in close custody of public officials. A jail record establishes that on December 10, 1946, defendant was examined by the jail physician, whose written report says that he found 'contusions of left anterior lower chest wall and numerous small bruises of scalp.'

"These wounds were such as could have been caused by blows. No effort was made by the prosecution to show (aside from the denials by the policemen of any violence) where or how these injuries were, in fact, inflicted, nor did the prosecution call as a witness the physician who made the entry into the jail records."

I called the Valletutti case and the Somner case and the quotation from corpus juris secundum to the attention of counsel during the course of the hearing. In this regard, I find of critical importance the fact that photographs taken of the defendant at about 3:20 P.M. do not show the abrasion or hematoma found at the hospital. I pointed out to counsel that I considered the photographs of critical importance, the photographs taken at 3:20.

It is important to note that the last confession was taken no later than 12:30 P.M. and that the photographs taken at police headquarters were taken at 3:20. However acquired and whether or not self-inflicted, this injury, therefore, the injury over the left eye, occurred some hours after the confessions were signed. The red blood cells in the urine which resulted in a diagnosis of a left renal contusion is consistent with the defendant's testimony of police brutality which, however, is rejected by the court. The presence of the red blood cells in the urine is also consistent with injury, whether or not self-inflicted, suffered by the defendant after the confessions were obtained or prior to his arrest.

In this connection, it should be noted that the defendant stated that he left the Tropicana Bar at

closing time, which he stated variously to have been about 3 A.M. or 4 A.M., that he did or did not go thereafter to a private club. The Living Room.

It is important to note that the rape was accompanied by violence, during which time the trauma resulting in the injury could have occurred, that he was semi-intoxicated when seen by Detective Heehan at about 6:20 A.M., and that when first taken to the Baldwin police station, he insisted on sitting on the floor, where he thrashed about with his right leg. All of which leads to the inference adopted by the Court, that the condition found at the hospital, if traumatic in origin, did not result from any actions of the police between the time of his arrest and the time the confessions were signed.

As was earlier pointed out, the defendant was warned by police authorities on a number of specific occasions of his constitutional rights, and on each and every occasion of his being so advised, the defendant, by language and conduct, replied that he fully understood his rights. In addition, the statements themselves, People's Exhibits 9 and 10, set forth in extenso the Miranda warnings, which were read aloud by the defendant prior to his signing the statements.

The defendant made a knowing, intelligent, voluntary waiver of his constitutional rights before executing the written statements which were given to the police.

There is one other item which negates the use of force, of such brutality, which would have resulted in the kind of injuries which were described by the defendant. All one has to do is look at the signature and address found at the end of People's Exhibits 9 and 10. That handwriting is not the handwriting of a man who is beaten the way this defendant stated he was, beaten.

It is here specifically held that during the interrogation, there was no threat of physical violence or any actual violence used, nor was the defendant tricked or cajoled into giving any statement. Specifically, it is held that C.P.L. 60.45, was not violated and that each of the written and oral confessions, admissions and other statements made by the defendant and testified to at the hearing may be received in evidence against him at the trial, since they were not involuntarily made. Such confessions, admissions or other statements were not involuntarily made, since they were not obtained from the defendant by the use or threatened use of physical force upon the defendant or by means of any

other improper conduct or undue pressure, which impaired the defendant's physical or mental condition, to the extent of undermining his ability to make a choice whether or not to make such a statement.

It is further held that the confessions, admissions or other statements were not obtained as a result of a public servant engaged in law enforcement activity or by a person acting under his direction or in cooperation with him, by means of any promise or statement of fact, which promise or statement creates a substantial risk that the defendant might falsely incriminate himself.

It is further held that the confessions, admissions or other statements were not obtained from the defendant in violation of such rights as the defendant may derive from the constitution of the state or from the United States. It is further affirmatively held that the injuries sustained by the defendant, as shown in the hospital record, and through the testimony of Dr. Firooz, were not the result of the use of physical force upon the defendant by any police officer or any person acting under a law enforcement officer's direction, or in cooperation with him, while engaged directly or indirectly in such conduct, as resulted in the confessions, admissions

or other statements made by the defendant and testified to at the hearing.

It is further held that the defendant affirmatively waived his right to have counsel present after his apprehension, during interrogation and at all other times, when the confessions, admissions or other statements confessed to were obtained from him.

With respect to each of these matters, the People have proven the voluntariness of the statements, beyond a reasonable doubt, and have sustained the heavy burden of proof placed on them; that the defendant affirmatively waived his constitutional rights and that the confessions, admissions or other statements were not involuntarily made; that there was no police beatings, threats or other brutality and that the oral and written statements were voluntary, without any promise, force, fear, coercion, duress, trickery or cajoling on the part of police authorities.

As to confessions resulting from violence, see 23 CJS, Criminal Law, Section 825, particularly Page 223. See also People against Valletutti, 297 New York, 226, 229, 230;

People against Sommer, 34 Appellate Division Second, 817, and cases therein cited;

People against Perez, 300 New York, 215, at Pages 216, 217;

People against Leonti, 18 New York Second, 334, 339, 390;

Stein against the People of the State of New York, 346 United States, 156, at Pages 182 to 184.

Compare People against Hill, 17 New York Second, 185, 189, 190. See also People against Valerius, 31 New York Second, 53.

At the Wade Hearing, the defendant attacked the show-up identification of the defendant by Miss Kusky at Hilton and Jay Streets in Freeport. The defendant, carrying his shoes, wearing the clothing described by the victim and conforming to the physical description given by her, was apprehended by the police a few blocks from the scene of the crime, in less than three minutes after its occurrence. During the pursuit, he was seen carrying the objects, his shoes, which he was still carrying when caught.

The victim had confronted the defendant face to face in a well-lighted store and later during the rape, under circumstances which unquestionably, indelibly imprinted the defendant's features and clothing on the victim's mind.

See People against Martin, 39 Appellate Division Second, 558, and People against Johns, 38 Appellate Division Second, 745. See also the cases cited in People against Martin.--

The defendant has failed to establish any violation of due process in the identification procedure. In any event, the victim's in-court identification, it is here based on the observations of the witness which were fixed in her mind by virtue of the incident that took place prior to and during the rape.

Even assuming, arguendo, the display of one photograph which was shown to the witness in the grand jury room, if we assume that that was improper, the People have shown, by clear and convincing evidence, that the in-court identification has an independent source; United States against Wade, 388 United States, 218; People against Burwell, 26 New York, 331.

The witness' identification of the defendant at the showup buttresses this conclusion.

The search and seizure suppression motion is founded on an attack on the actions of the police in seizing the clothing worn by the defendant at the Freeport police station and the seizure of the shoes at the time of the defendant's apprehension. The defendant's argumen

deserves short shrift. Unquestionably this seizure was contemporaneous and coincident with the defendant's arrest and is, therefore, proper. Compare United States against Robinson, 94 Supreme Court, 467, 471. The Wade motion, the search and seizure suppression motion and the Huntley Hearing suppression motion is denied.

This brings me to the applications made for the first time here during Mr. Berger's argument. I have suppressed People's or I should say I have stricken the testimony given by the defendant, insofar as it relates to the material obtained by the People from Exhibit 23. I do not at this time determine, however, that People's 23 may not be used on cross examination during the course of the trial, if the defendant takes the stand.

I deny the application at this time, with leave to renew during the trial, if the occasion arises; that is, if it is renewed.

I have nothing to say on the polygraph tests. If Mr. Berger's statement was an application, I am required to deny it. I gather it was not an application. It was an appeal to the district attorney to consent to something.

In any event, there is nothing for me to decide. But if it were an application, I would deny it.

31 THE PEOPLE OF THE STATE OF NEW YORK, Respondent. v JOSEPH COLLINS, Appellant.—Appeal by defendant from a judgment of the County Court, Nassau County, rendered May 31, 1974, convicting him of rape in the first degree and assault in the third degree, upon a jury verdict, and imposing sentence. Judgment affirmed. No opinion. Cohalan, Acting P. J., Christ, Brennan and Munder, JJ., concur; Shapiro, J., dissents and votes to reverse the judgment and order a new trial, with the following memorandum: The fact that the crime here charged is a most vicious one naturally causes one to cringe, but it does not justify a disregard of defendant's basic constitutional right to a fair trial. A statement made by defendant—which established a strong prop in the chain of evidence against him—was refused suppression. Its receipt in evidence, in my judgment, constituted substantial error as a matter of law. It should have been suppressed because the record makes it clear that before making the inculpatory statement defendant repeatedly requested counsel; at no time did he knowingly and intentionally waive his constitutional rights. One of the People's witnesses at the *Huntley* hearing, Detective Furno, testified that after he advised defendant of his *Miranda* rights the latter said he did not understand the meaning of the word "attorney". He was then told that an attorney was a lawyer. The following colloquy then took place, according to Furno: "A Well, at one point I said that, you know, if he couldn't afford a lawyer, the county would take care of getting a lawyer for him. Then he asked me, he says, 'They will

give me a lawyer?' I said, 'They will appoint a lawyer for you.' And he said, 'Which one?' And I said, 'I don't know which one. Either Legal Aid or a court-appointed lawyer.' I said, 'If you cannot afford one, they will appoint one.' Q Did you ask him if he wanted a lawyer then? A Well, then I said—well, he said, 'Okay.' And then I told him, 'Do you understand these rights? Do you want to talk to a lawyer now? Do you want to talk to one?' And he said, 'Could you advise me of which one?' And I said, 'No, I'm not allowed to do that.'" Thus, despite defendant's request that he advise him "of which one", i.e., either Legal Aid or a court-appointed lawyer, Furno refused to interpret defendant's answer as a request for counsel.* The detective then testified that at this point, even though defendant stated that he understood his rights, he (Furno) did not believe that to be the case; he then quickly read defendant his rights for a second time. Defendant said "yes, okay" in response to the question whether he understood what had been read to him. Furno then proceeded to question him. After several minutes that questioning was followed by questioning of defendant by Detective Morrissey, who had come into the room and who again asked defendant if he understood his rights. After defendant replied affirmatively, Morrissey elicited the inculpatory statements and thereafter refused suppression. In my opinion, defendant's request for the recommendation of an attorney (either Legal Aid or a court-appointed attorney) was not only tantamount to, but was a direct request for the aid of counsel (cf. *People v Watts*, 35 AD2d 802, aff'd 29 NY2d 571). All questioning of defendant should have ceased at that point and Morrissey's questions, which came only minutes after defendant's request for counsel, should be considered as one uninterrupted interrogatory process (see *People v Valerius*, 31 NY2d 51; *Clewis v Texas*, 386 US 707, 710). In sum, as the court said in the now famous *Miranda* case (*Miranda v Arizona*, 384 US 436, 444-445): "If, however, he [the defendant] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning" (emphasis added). That indication was more than clear in this case. I am also of the opinion that sufficient basis was established for the admission of the statistical data sought to be elicited from the witness Dr. Primavera and that its exclusion by the court was error (2 Bender's New York Evidence, § 53.02, subd [1]).

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v
JOSEPH COLLINS, Appellant.

Argued February 19, 1976; decided March 25, 1976

Crimes — confessions — following hearing, trial court denied motions by
defendant to suppress statements made by him to police, physical evidence

seized at time of his apprehension, and identification of him by complainant, and he was subsequently convicted of rape in first degree and assault in third degree — contentions by him that he had made request for assistance of counsel prior to making statements to police, and did not make knowing and intelligent waiver of his right to counsel, that People did not meet their burden of explaining existence of injuries which were consistent with his claim of police brutality, and that trial court committed reversible error when it refused to permit defense to offer certain expert testimony — order which affirmed judgment of conviction affirmed — on issues of whether defendant had, at time of preinterrogation warnings, indicated in some fashion wish to have lawyer, and whether he had been beaten by police, record is troublesome, but, on whole, affirmance is required.

People v Collins, 48 AD2d 841, affirmed.

APPEAL, by permission of a Justice of the Appellate Division of the Supreme Court in the Second Judicial Department, from an order of that court, entered June 2, 1975, which affirmed a judgment of the Nassau County Court (BERNARD TOMSON, J.), rendered upon a verdict convicting defendant of rape in the first degree and assault in the third degree. Following a hearing, the trial court had denied motions by defendant to suppress statements made by him to the police, physical evidence seized at the time of his apprehension, and an identification of him by the complainant, finding that defendant had made a knowing, intelligent, and voluntary waiver of his constitutional rights before making the statements; that they had not been obtained from him by the use or threatened use of physical force or by any other improper conduct or undue pressure; that the seizure of the physical evidence was contemporaneous with defendant's arrest, and that the complainant's in-court identification of him was based upon her own observations and was untainted by any improper pretrial identification procedure. In the Court of Appeals defendant argued that he had made a request for assistance of counsel prior to making the statements to the police, and did not make a knowing and intelligent waiver of his right to counsel that the People did not meet their burden of explaining the existence of injuries which were consistent with his claim of police brutality, and that the trial court committed reversible error when it refused to permit the defense to offer certain expert testimony.

Theodore Ruthizer, James J. McDonough and Matthew Muraskin for appellant.

Denis Dillon, District Attorney (Robert N. Zausmer and William C. Donnino of counsel), for respondent.

MEMORANDUM. Order affirmed.

On the two issues whether defendant had at the time of the preinterrogation warnings indicated in some fashion a wish to have a lawyer and whether he had been beaten by the police, the record is troublesome.

Were the matter confined to the conversations between Detective Furno and defendant, the conclusions of the dissenter at the Appellate Division would be irresistible. But the fact is that there were many conversations between defendant and other police officers, particularly those with Detective Morrissey immediately preceding his making of several exculpatory statements and finally the two signed confessions. The testimony concerning these conversations and the several statements by defendant, resulting eventually in the signed confessions which followed the contradiction of defendant's alibi by his "girl friend", support the findings of fact that defendant waived his right to have a lawyer.

A-25 With respect to the evidence of police beatings, the objective evidence of minor bruises and a minor laceration could have been persuasive of the contention of police beatings. It is true, however, that defendant's description of the beatings, because so obviously excessive in light of the injuries claimed, was incredible as found by the hearing court on the pretrial confession hearing. The blood in the urine was explained by defendant's recent surgical operation in the groin area.

On the whole, therefore, it is concluded that an affirmance is required. The other issues raised by defendant are either meritless or immaterial in view of the all but conclusive proof of defendant's guilt and the positive identification of defendant within minutes of the crime. Defendant's blood-stained clothing, his running through the streets with his white three-inch platform, blood-stained shoes in hand, within a few blocks of the crime, and the dissipation of his police station alibi, point unavoidably to his guilt.

Chief Judge BREITEL and Judges JASEN, GABRIELLI, JONES, WACHTLER, FUCHSBERG and COOKE concur.

Order affirmed in a memorandum.

JAN 21 1968

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LIBRARY
CRIMINAL DIVISION

- - - - -x

JOSEPH COLLINS,

76 C 1840

Petitioner,

MEMORANDUM AND
ORDER

-against-

January 28, 1977

WALTER FOGG, Superintendent,
Greenhaven Correctional Facility,

Respondent.

- - - - -x

PLATT, D.J.

By a petition for a writ of habeas corpus, Joseph Collins challenges his conviction for Rape in the Third Degree and Assault in the Third Degree imposed upon him after a jury trial in the Nassau County Court in violation of Title 23 U.S.C. § 2241 et seq.

The following findings of fact were made by the County Court. Eugenia Kusky was using the facilities of a laundromat in Freeport, New York, when she saw a man whom she later identified as the petitioner herein looking through the glass front of the store. The man entered the laundromat, placed his arm around her, and when she resisted his advances, pushed her to the back of the store and repeatedly "stomped" on her with heavy, three inch heeled, white boots. Miss Kusky was then dragged out of the laundromat to a lot behind the store and raped. Shortly after the crime, two police officers arrived and found the victim who gave them a detailed description of her assailant. Three to four minutes later, one of the officers arrested the petitioner who was one and one-half blocks from the scene of the crime and running in

an easterly direction carrying a pair of blood stained white boots. The petitioner was arrested, advised of his Miranda rights and immediately identified by Miss Kusky. He was taken to the Freeport police station at approximately 5:50 A.M. where his clothes were removed and he was supplied with other clothing. At approximately 7:25 A.M., the petitioner was taken to the Baldwin Precinct where he was advised several more times of his Miranda rights and questioned. He made no inculpatory statements. At approximately 9:30 A.M., Detective Morrissey advised the petitioner of his Miranda rights, and spoke to him about his belief in God. The petitioner then made the first of two confessions which was reduced to writing, signed by the petitioner, and witnessed by two officers. A second confession was made at approximately 12:30 P.M. which paralleled the earlier one in every respect, except that in the second confession the petitioner admitted that he had not visited his girlfriend prior to going to the laundromat as he had claimed in his first confession. At approximately 2:44 P.M. the petitioner was taken to the Mineola Police Headquarters where he was photographed and fingerprinted. In response to a question from a desk officer, he alleged for the first time that he had been beaten and kicked by the police and asked to see a doctor. At approximately 4:00 P.M., the petitioner was taken to the Nassau County Medical Center and examined by Dr. Firoozi. The only evidence of a beating found by the doctor was a small abrasion over the petitioner's left eye and numerous red blood cells in his urine.

The petitioner's account of the events leading up to his confessions differed sharply from the other testimony. He claimed that after his arrest he was placed in the front seat of the arresting officer's car, who was alone at the time, and was beaten over the top and back of his head with a blackjack which "busted" his nose, caused him to bleed, and injured his right eye. The petitioner further claimed that he was never taken to the Freeport police station, that he was repeatedly beaten during the day of his arrest, both in the stationhouses and at the hospital by several police officers including a "tall blond individual", and that he requested but was denied the assistance of counsel.

The State Court found that the testimony of the police officers who arrested and interrogated the petitioner was credible, and that the petitioner was not beaten or coerced into confessing. Specifically, the Court found that there were no "tall blond cops" who beat the petitioner since there were no policemen fitting that description on the force, that the petitioner's claim that he was beaten in a police car and the stationhouses was incredible in that the only medical evidence of injury was a small cut over the petitioner's left eye and a high red blood cell count in his urine. The Court found that the cut must have occurred after the confessions were given since no such injury was visible in a mug shot taken at 3:30 that afternoon, and that the high red blood cell count in the urine was explainable as either a side effect from a recent operation, a result of the violence during the commission of the crime, or a result of the petitioner's own "thrashing about" in the police station. The Court also

relied on the clarity of the petitioner's signature on the confession in concluding that he had not been beaten by the police. Furthermore, the Court concluded that on each and every occasion that the petitioner was warned of his constitutional rights he replied that he fully understood them and made a knowing, intelligent, and voluntary waiver of those rights.

The decision of the County Court was affirmed by the Appellate Division, Second Department, on June 2, 1975, and by the New York Court of Appeals on March 25, 1976.

Petitioner argues herein that his confessions should have been suppressed since: (i) they were a product of police coercion; (ii) he requested but was denied the right to counsel.

I

Petitioner has exhausted his state remedies. The claims raised herein were argued in the petitioner's brief to the State Courts. Title 28 U.S.C. § 2254(b) and (c).

II

Petitioner's first claim was dismissed at oral argument. The Court held that the petitioner had not met his burden of proof by convincing evidence that the factual determination of the State Court that petitioner was not beaten or otherwise coerced into confessing was erroneous. Title 28 U.S.C. § 2254(d); U.S. ex rel. Stanbridge v. Zelker, 514 F.2d 45 (2d Cir.), cert. denied, 423 U.S. 872 (1975).

III

Petitioner's second argument, that he requested but was denied the assistance of counsel, presents a somewhat closer question. Petitioner relies on the testimony of Detective Furno who said that the petitioner asked him if he could recommend an attorney, to which he replied that it would be a Legal Aid or other appointed attorney, but that he could not recommend one. The detective's testimony is reproduced in relevant part in the appendix of this decision.

We recognize initially that where interrogation of a defendant occurs without the presence of an attorney and a statement is obtained, a heavy burden rests on the state to show that the defendant knowingly and intelligently waived his right to counsel. Miranda v. State of Arizona, 384 U.S. 436, 475 (1966). However, we think that the state has satisfied its burden in this case. The testimony of Detective Furno reflects that he made every effort to explain the petitioner's Miranda rights to him, including the right to counsel. All told, the petitioner was advised of his rights at least five times following his arrest, including three times after the colloquy relied upon herein.

The pattern here is particularly interesting and significant. The detective advised the defendant "that he didn't have to talk to me, that he could talk to an attorney first," then explained to him what an attorney was, and "Then (the defendant) says, 'Oh, a lawyer? Yes I know what a lawyer is.'

1/ Captions on the two written confessions signed by the petitioner contained the Miranda warnings.

After the detective advised him again of his right to a lawyer before talking to him the defendant changed the subject.

Thereafter the defendant asked "When am I going to be able to make my one phone call?" to which the detective replied "You are entitled to make a phone call and we don't limit you to one" and then asked if he wanted to make a phone call and the defendant said "No".

After all that they went back to a discussion of whether he wanted a lawyer which culminated in the detective's suggestion that Legal Aid might be appointed for him and the defendant's query "Can you recommend one to me" and when the answer to that was "No, we are not allowed to do that", defendant again changed the subject and asked when he was going to get beat up. Thereafter there followed a discussion on this subject.

While we agree that under some circumstances a request for a recommendation of an attorney, taken alone, might require that the police curtail further questioning, viewing the pattern of events in this case we cannot say that the request here was more than one of curious inquiry or that the petitioner's subsequent confessions were obtained in violation of his constitutional rights. This is not a case where the petitioner was faced with "relentless interrogators", nor did his well-being depend "on his submission to a menacing captor's demands". Cf. United States v. Collins, 462 F.2d 792, 797 (2d Cir. en banc), cert. denied, 409 U.S. 988 (1972).

To the contrary, when viewed in their entirety the testimony of the detective reflects a genuine concern for the protection of the petitioner's rights and the responses of the defendant indicate only a desire to know what the procedure was.

There was no affirmative request for an attorney despite the numerous opportunities given to the defendant to make one.

Two State Courts have addressed the precise issue raised by the petitioner herein. In People v. Superior Court, 15 Cal. 3d 729, 542 P.2d 1390, 125 Cal. Rptr. 795 (1975), cert. denied, 45 U.S.L.W. 3249, the California Supreme Court held that the defendants' request for a recommendation of an attorney constituted a request for the assistance of counsel and the Court suppressed a confession procured during the subsequent interrogation. The California case is distinguishable from the case at bar. The California Court relied principally on the testimony that the defendants first said either "I guess we need a lawyer" or "Do you think we need a lawyer?"^{2/} The Deputies answered in the affirmative. Only after this exchange did the defendants request that the deputies recommend an attorney. In the case at bar, on the other hand, the testimony reflects no such preliminary colloquy. Furthermore, the California Deputies told the defendants in that case that they could make the officers' jobs "easy or tough". The Court may well have been concerned that the defendants interpreted that language as a veiled threat by the officers. No such threats were made in the case at bar. Thus, we do not believe that the California case supports the petitioner's position herein.

^{2/} The record was apparently unclear on this point.

In People v. Whitman, 182 Colo. 6, 510 P.2d 432 (1973), the Colorado Supreme Court held that where a defendant asked an officer how and where he could contact an attorney, it did not constitute a request for counsel. The Court relied on the pattern of conduct, especially the fact the petitioner did not pursue the matter.

Finally, in United States v. Bettenhausen, 499 F.2d 1223 (10th Cir. 1974), a case slightly analogous to the one at bar, the Court held that where a defendant inquired of one Special Agent if he was in trouble and also if he needed a lawyer, it did not constitute a request for the assistance of counsel, thereby cutting off the right of further inquiry. We think that the approach taken by the Tenth Circuit and the Colorado Supreme Court is correct and that the proper inquiry is not whether one statement taken in the abstract constitutes an invocation of one's right to counsel, rather the Court must focus on the pattern of police conduct and "all of the relevant circumstances". Cf. Brady v. U.S., 397 U.S. 742 (1970). We agree with the New York Court of Appeals that the testimony concerning the conversations between the petitioner and the police officers, and the two signed confessions support the conclusion that the petitioner voluntarily and intelligently waived his right to the assistance of counsel.

For the foregoing reasons, petitioner's application for a writ of habeas corpus must be, and the same hereby is, denied.

Thomas C. Belt

U.S.D.J.

Appendix - Re Page 5

"I told him, I says, 'I don't know if you have been advised of your rights or not, but I'd like to advise you that you don't have to talk to me,' and then I was looking at him, and I kind of got the impression, the way he was sitting, that he either wasn't paying attention to me or he wasn't understanding what I was telling him. So instead of me taking out the card, which I normally have, and read him the rights, I went into great lengths with him about his rights

I told him that he didn't have to talk to me, that he could talk to an attorney first, and he looked at me and I says, 'Do you understand me? Do you understand what an attorney is?' And he said, 'Well, I think I do.' And then I says -- because I wanted to make sure -- I says, 'An attorney is somebody that gives you your legal rights, tells you everything about a court and the case and he helps you.' And I says, 'He is a lawyer.'

Then he says, 'Oh, a lawyer? Yes, I know what a lawyer is.' Then I says, 'You have a right to talk to a lawyer before you talk to me, before you answer any questions; and anything you tell me can and will be used in court against you.' Then he asked me a few things, you know.

Q I beg your pardon, Officer?

A You know, he interrupted at that time and he asked me and said, 'Well, when am I going to be able to make my one phone call?' And I says, 'You are entitled to make a phone call, and we don't limit you to one.' Then he said something like 'All I get is one, right?' And I says, 'No, you can make as many as you like, as long as you don't make a long-distance phone call. There I have to get permission. You want to make a phone call?' 'No,' he says, 'I was just wondering when I was going to be able to make it.'

So then I got back to it and I says, 'Before answering any questions, you can have this attorney present.' In other words, I went back to the rights again. I said, 'You don't have to talk to me and you don't have to give me any statement. You can have a lawyer; and if you can't afford one, then the county will take care of the charge.' He says, 'Okay.' Then at that point I remember taking out the card and I read the rest of it to him.

Q Do you remember what you said, Officer?

A Yes, I read the whole thing at that point. You know, starting from the beginning, telling him he has a right to remain silent, that any statement he does make will be used against him in court; he has the right to talk to an attorney before answering any questions and to have a lawyer present at any time; and if he couldn't afford to hire a lawyer, the county will hire one for him, and he has the right of remaining silent until he has an opportunity of consulting this lawyer.

He then asked me, 'Do you mean they will give me a lawyer?' And I says, 'They will give you a lawyer.' And he says, 'What lawyer?' And I said, 'I don't know, it's up to the county. They will appoint one. Whether it's Legal Aid or another one, I don't know, but they will appoint one.' Then he says, 'Can you recommend one to me?' And I said, 'No, we are not allowed to do that.'

Then he says to me, 'All right, when am I goint to get hit?'

THE COURT: What did you say?

THE WITNESS: He says, 'The last time they beat me up.' I says, 'We don't beat up anybody here. I don't know what you mean by beating up.' I says, 'Here, if you get beat up, we are the ones that get arrested, not you.' And he says, 'Last time they beat me up.' And I says, 'It wasn't in this place, because you never get beat up in here.' And he says, 'No, it wasn't here.'

Then I asked him about going into this, what his involvement was, and he says, 'I didn't do anything. I was out with my girlfriend. I was at her house.' He said, 'I was at her house most of the night. I was in bed with her a few times and then, finally, her mother threw me out, and I was walking out,' and he said, 'I was carrying my shoes,' and he says, 'The police came up and they grabbed me and they brought me in here.' I says, 'You are sure you had nothing whatsoever to do with this?' And he said, 'No, nothing.'

Then I remember Detective -- to be honest with you, I really don't remember. There were people walking in and out, and I don't remember who said something to him, but somebody said, 'Where are your shoes?' And he says, 'I don't know.' Then I says, 'Is this the way you go out at night with your girl friend, dressed like that?' And he says, 'No.' And then I says, 'Your clothes, you got old clothes and they are all wrinkled and dirty.' And he says, 'They are not my clothes. These are the clothes that they gave me.'

Then Detective Morrissey, I believe, at that point came into the room and was listening to the conversation. A couple of questions were thrown at him. I don't remember exactly.

Q Who else was there at this time?

A Well, people were walking in and out. I wasn't paying any attention to who really. The only one I can remember there, being there most of the time was Patrolman Parker. I remember people walking out to get coffee. I remember Detective Woessner being there, Detective Morrissey. I remember seeing Detective Mazyck walk in. But as far as anybody questioning, I don't know. I knew a couple of questions were asked of him. I don't really know who asked them.

The next general conversation, I heard a lot of questions being asked of him, and it was Detective Morrissey.

Q Detective Morrissey entered the conversation?

A At one time or another.

Q Do you recall what Detective Morrissey said?

A Well, Detective Morrissey first asked me, 'Did anybody advise this man of his rights?' And I said, 'Yes, I did.' Then he said, 'Well, as a matter of procedure, I am going to advise you again.' And he read something. He read the rights to him off a card.

Wait, I don't think he even had the card. He just did it from memory at that point. That's right. He asked the defendant again what his involvement was, and the defendant said, 'Nothing, I didn't do anything.'

Then Detective Morrissey, I remember asking him, the defendant, something to the effect of 'Are you married?' And he said, 'No.' Then he says, 'Do you have any kids?' And he said, 'No.' And then he said, 'Do you have any sisters or brothers?' And he says, 'Yes, I got a sister'-- well, he either said a sister or two sisters. I don't remember at this point.

Then Detective Morrissey, he asked him, 'Would you like something like this to happen to them?' And he bowed his head and he just shook his head and then he mumbled something which I believe was 'No,' but I wasn't positive really what he said.

Detective Morrissey asked him, 'Well, would you like to talk to us or are you ashamed to talk to us?' He said, would you rather talk to one of us?' And the defendant said, 'I don't know what you mean.' And he said, 'Well, would you rather talk to just one of us instead of everybody here?' And he said, 'Yes.'

So Detective Morrissey asked us to leave, and we got up and we did.

Q You left?

A Yes.

Q And you went about other business, is that right?

A Yes, sir.

Q And from that point, when you left that room, until today, have you ever seen this defendant before?

A No, sir."

APR 1 1977

RECEIVED
RECEIVED
APR 1 2 33 PM '77
DISTRICT ATTORNEY'S OFFICE
NASSAU COUNTY, N.Y.

[Handwritten signature]